LIBRARY
SUPREME COURT, U. S.

73-392

Supreme Court, U. S.
FILED
AUG 31 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

JEROME DALY, PETITIONER,

VS.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI

JEROME DALY
PETITIONER
P.O BOX 1676
ST. PAUL, MINNESOTA
55111

IN THE

Supreme Court of the United States

INDEX

PETITION FOR A WRIT OF CERTIORARI	1.
OPINION OF THE EIGHTH CIRCUIT COURT OF APPEALS BELOW	20.
JURISDICTION OF THE COURT	1.
QUESTIONS PRESENTED FOR REVIEW	2.
CONSTITUTIONAL PROVISIONS INVOLVED	3.
STATEMENT OF THE CASE	8.
ARGUMENT	10.
CONCLUSION	18.

OPINION OF THE EIGHTH CIRCUIT COURT OF APPEALS

IN THE SUPREME COURT OF
THE UNITED STATES OF AMERICA

Jerome Daly, Petitioner,

vs.

United States of America, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES TO REVIEW MANDATE ENTERED BY THE CIRCUIT COURT OF APPEALS ON JULY 20, 1973 AND JUDGMENT ENTERED BY U.S. DISTRICT COURT FOR MINNESOTA ON DECEMBER 18, 1972.

TO: The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States of America.

Your Petitioner, Jerome Daly, having been first duly sworn respectfully represents and Petitions the Supreme Court of the United States as follows:

I.
OFFICIAL REPORTS

The opinion was filed in the Circuit Court of Appeals for the 8th Circuit on July 20, 1973. It is not cited in any official reports as yet. It is attached hereto as an appendix.

II.
JURISDICTION OF THE COURT

The grounds upon which the jurisdiction of the Court is invoked is as follows:

This is a Common Law Writ of Certiorari to seek review of the Judgment of a State Supreme Court. Jurisdiction is Conferred by Article 3 and Amendments 1, 4, 5, 6, 9, and 14 of the Constitution of the United States. Also jurisdiction is conferred pursuant to 28 U.S. Code Sec. 1651 and 1254.

III.
QUESTIONS PRESENTED FOR REVIEW

1. Where a Taxpayer objects to the form of the 1040 return and raises his objection that the return calls for answers that violate Taxpayer's privilege against self incrimination and files the return with the IRS on time, can he be deemed to waive his Fifth Amendment rights against self incrimination by failing to claim the privilege on each specific question and then by starting a suit in the U.S. District Court and submitting the subject matter to the Court for its determination as to the validity of the self incrimination claim?

2. Does the Fifth Amendment privilege against self incrimination bar a prosecution where the taxpayer follows the admonition in U.S. vs. Sullivan, 274 U.S. 259-, and raises his objection in the return so that it may be passed upon?

3. Does a Statute have to save the rights of the parties in order to be procedurally Constitutional?

4. Can the Circuit Court set up an ex post facto procedure in raising Fifth Amendment objections on the return and then uphold Petitioner's conviction based upon the failure to follow that procedure?

5. Is there any duty on the part of the Internal Revenue Service, to give full and adequate procedural instructions on the law when they undertake to advise and direct the taxpayer?

6. Is the right to be free from self incrimination a vested right included in life, liberty and property, that cannot be divested without due process of law?

IV.
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I. "Congress shall make no law abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances."

Article IV. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Article V. "No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

Article IX. "The enumeration of the Constitution of certain rights, shall not be construed to deny or dispárage others retained by the people."

Article 1, Section 9. "No Bill of Attainder or ex post facto Law shall be passed."

Article 1, Section 8, Clause 17. "Congress shall exercise exclusive legislation in all Cases whatsoever over (The District of Columbia)--and to exercise like Authority overall other needful Buildings."

Amendment 16. "The Congress shall have the power to lay and collect taxes on incomes, from whatever source derived."

7203. Willful Failure to File Return, Supply Information, or Pay Tax. "Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply

such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution." (Emphasis added)

V.
STATEMENT OF THE CASE

For the years 1965 through 1969 Petitioner filed a timely 1040 Individual Income Tax Return stating his address, occupation, Social Security Number and his age. There was no other information as required by 26 U.S. Code and the regulations nor was a tax computed or payment of a tax made. Attached to each of the returns was Exhibit "A" raising certain constitutional objections to the form of the return and the information required to be supplied thereupon. Among other objections as to the constitutionality of the Income Tax as it is presently applied "Exhibit A" contained the following objection:

> "I further plead the Constitution of the United States, and each and every part thereof as though herein set out in full; with particular reference to Sections 4, 5 and 6 of the Bill of Rights and the Fourteenth Amendment, U.S. Constitution. I further plead the Declaration of Independence and each and every part thereof as though herein set out in full.
>
> "I further object to the form of the return upon the grounds that it my tend to supply information which may tend to lead to information which might tend to uncover information which might tend to incriminate me.
>
> "I further invite the U.S. Government and its proper agency--to bring a Civil Action against me if they think I owe an Income Tax under the present U.S. Income Tax Statutes."

In 1966 the Internal Revenue Service gave the 1965 Return a number and processed it by serving an Internal Revenue Summons upon Petitioner. Petitioner appeared pursuant to the Internal Revenue Summons and pled the Fifth Amendment to each question asked by the examiner.

At the conclusion of a Summons enforcement proceedings in the District Court Petitioner was ordered to appear before the agent and produce his books and records and testify on January 6, 1967. Petitioner again appeared and pled the Fifth Amendment right against self incrimination. Thereafter Petitioner was brought before the Court and summarily found in contempt without a hearing. The Eighth Circuit reversed in Daly vs. U.S. 393 F 2d 873 (1968) and sent the matter back for hearing before the Court to give separate consideration to each question asked by the examiner. At the re-hearing the trial court held that Petitioner did not have to answer any questions asked by the examiner upon Fifth Amendment grounds.

The Internal Revenue Service then filed a Notice of Appeal on December 8, 1968; nine days later they dismissed their appeal. Thereafter the IRS took no further administrative action.

Thereafter, on March 5, 1969, unbeknownst to Petitioner, the 8th Circuit in Heligman vs. U.S. cited as 407 F. 2d 448 in a case where a corporate president failed to file any return at all, declared the law on the subject as follows:

> The Government considers the matter controlled by United States v. Sullivan, 274 U.S. 259, 47 S.Ct. 607, 71 L.Ed. 1037 (1927), where a unanimous court in an opinion by Mr. Justic Holmes held that the income tax law applies to illegal gains and that the Fifth Amendment protection does not protect the recipient of illegal gains from prosecution for willful failure to make a return. That Court further held at 263, 47 S.Ct. at 607 that if the return called "for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all."

The rationale declared in Sullivan was followed by us in Daly v. United States, 393 F.2d 873 (1968), where we held that a taxpayer was not entitled to a blanket Fifth Amendment objection to an inquiry and interrogation by the Internal Revenue Service, and that the taxpayer, "cannot assert the privilege to every question asked by the examiner, most of which are innocuous on their face." We thus left open the question as indicated in Sullivan of whether there might be specific questions in the return, or as in Daly in the interrogation, the answers to which might be privileged. But the taxpayer is not the final arbiter of the privilege. The privilege must be specifically claimed on a particular question and the matter submitted to the court for its determination as to the validity of the claim.

The Court went on to state:

"Offenses for violations of the tax laws, are, of course, set up as a necessary enforcement measure. Our income tax system is to a large extent predicated upon the voluntary disclosure of taxable income. The operation of this system is of crucial concern to the nation. The public need for requiring voluntary disclosures of income transcends any personal right to thwart national objectives by allowing an undisclosed self-determination of possible incrimination, thus excusing compliance with the income tax laws. We, therefore, hold that the Fifth Amendment privilege against incrimination does not extend to defendant's failure to file or cause to be filed the corporate tax returns of E & H Leasing Company."

Thereafter on December 19, 1969, long after the returns for 1967 and 1968 were due, the IRS gave notice by letter to Petitioner that it was no longer going to treat his returns as returns at all. The letter, which is in evidence, outlines Petitioner's constitutional objections including the self incrimination objections raised in the returns for 1966, 1967 and 1968. The letter goes on to advise Petitioner as to the law as follows:

"The documents submitted by you for the years 1966, 1967 and 1968 do not constitute income tax returns as required by law; and, therefore, they cannot be accepted and are being returned herewith. To comply with the law which is quoted below, you should (promptly) file completed, signed Forms 1040 for the years 1966, 1967 and 1968.

The legal obligation to file income tax returns is established by Sections 6001, 6011 and 6012, Title 26, United States Code, which are quoted below:"

The letter set forth the sections and closed as follows:

"Continued non-compliance with the legal requirements for filing income tax returns could subject you to prosecution under the above-quoted Section 7203.

Very truly yours,
(signed) George O. Lethert

George O. Lethert
District Director
St. Paul District"

Nowhere in the letter was Petitioner's attention directed to the case of Heligman vs. U.S. supra, nor was there any suggestion that it was Petitioner's obligation, if he wished to preserve his Fifth Amendment rights against self incrimination, to specifically raise his objection to each individual request for information in the 1040 Return and the attached schedules and to start a suit for declaratory Judgment and injunction before a three judge court to have his rights against self incrimination determined.

Thereafter, on June 28, 1972, Petitioner was indicted for a willful failure to file 1040 Returns for the years 1967 and 1968.

The trial was had on October 10 through 12 of 1973. The Court instructed the jury as follows:

"In connection therewith, I advise you that the income tax law is constitutional and no person has the constitutional right to avoid the requirement of filing an income tax return on the grounds that it violates his Fifth Amendment rights against self-incrimination if, in fact, he is required by law or regulation to file such.

"I further advise you that a person may not rely on his Fourth Amendment rights to unreasonable search and seizures as a ground to avoid filing an income tax return when, by law, he is required to do so.

"I also advise you that you need not concern yourselves with making any kind of a judgment or a finding with reference to the claimed Sixth Amendment violations or any alleged rights under the Declaration of Independence or the Fourteenth Amendment to the Constitution.

"All of these are issues of law for me to decide, they're not questions of fact for the jury to decide.

"So I emphasize to you, the three essential requirements which the government must prove in this case in order to justify a conviction are, as I have said it to you, first, that the defendant was a person required by law to make a return for the year in question, receiving more than $600 worth of income; second, that he failed to file a return, a proper return, for each of those years; and third, that the failure to file such a return in each of those years was willful."

The trial court denied requested instructions along the lines set forth in U.S. vs. Sullivan, 274 U.S. 259 and also along the lines set forth in U.S. vs. Murdock 290 U.S. 389 as follows:

"You are further instructed that if the form of the return provided called for answers that the Defendant was privileged from making upon the grounds that to do so might tend to

incriminate Defendant he could raise the objection in the return or attachments thereto, but could not on that account refuse to make any return at all. The important point is, if Defendant desired to preserve his rights against self incrimination then he must place the government upon Notice at the time or times required by law. See U.S. v. Sullivan 274 U.S. 259.

"The Jury is further instructed that the U.S. Constitution provides--'Nor shall any person be compelled in a criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law." (U.S. Const. Amendment 5)

"If a person desires to exercise his privilege against self incrimination he has the right to do so. This is not for the authorities executing the law to decide." See Miranda v. Arizona 384 U.S. 436.

"The jury is instructed that one failing to file Income Tax returns and failing to supply the information for the computation, assessment or collection of Income Taxes because of a bona fide misunderstanding as to what the law is, is not guilty of willfully failing to do so.

In other words a bona fide misunderstanding as to what the law is, is a complete defense to willful failure to file returns or supply information. See U.S. vs. Murdock 54 S.Ct. 223; Paps vs. U.S. 216 F 2d 515."

Thus instructed the Jury returned a verdict of guilty on both counts on October 13, 1972. Judgment was entered in the District Court on December 18, 1972. The Eighth Circuit affirmed on July 20, 1973. See attached opinion.

VI.
ARGUMENT

As is indicated, Petitioner made a timely assertion of his Fifth Amendment rights to the Administrative Agency, Department of the Treasury along the guide lines set out in U.S. vs. Sullivan 274 US 259 (1927) which are as follows:

> "As the defendant's income was taxed, the statute of course required a return. * * * In the decision that this was contrary to the Constitution we are of opinion that the protection of the Fifth Amendment was pressed too far. If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all. We are not called on to decide what, if anything, he might have withheld. * * * (It would be) an extreme if not an extravagant application of the Fifth Amendment (to say that it authorized a man to refuse to state the amount of his income because it had been made in crime). But if the defendant desired to test that or any other point he should have tested it in the return so that it could be passed upon." United State v. Sullivan, 274 U.S., at 263-264, 47 S.Ct., at 607-608.

The only reasonable interpretation of this case is that the Fifth Amendment privilege against self incrimination, which is a vested right, is waived if it is not claimed in the return so that it may be passed upon by the administrative agency and the Courts if necessary.

Now the Eighth Circuit holds in effect, although the Court does not come out and directly so hold, that if the taxpayer wishes to preserve his Fifth Amendment right against self incrimination he must specifically raise the objection as to each specific question in the return and then submit the matter to the Court so that it can be passed upon. However, the only way it can be passed upon is by commencing an action by way of declaratory judgment and injunc-

tion. In view of the question of the constitutionality of 28 USC 2201, which excepts declaratory relief in any case in respect to Federal Taxes, and the question of the constitutionality of 26 USC Sec. 7203, then the question must be presented to a three Judge Court.

The Fifth Amendment right against self incrimination is a natural right and a vested right. If the rule set forth by the Eighth Circuit holds then the citizen will have to have a lawyer represent him who is well trained in the Federal Law in order to protect his fundamental right against self incrimination in reference to the administration of the Income Tax.

The decision in Heligman vs. U.S. setting up the procedure is in the nature of an ex post facto law. It was not finally decided until after the time expired for Petitioner to file his returns. Ex Post Facto laws are outlawed by Article 1, Section 9 of the U.S. Constitution.

Furthermore, all of the Officials of the Department of the Treasury and the Internal Revenue Service and sworn to support the Constitution of the United States. They are servants and trustees of the people for the purpose of exercising certain administrative duties agreeable to the Constitution and laws of the United States.

When the IRS District Director undertook to advise and instruct Petitioner on the law and the proper lawful procedure by letter on December 19, 1969, he was under the duty to give full, complete and adequate instructions to the end that every provision of the Constitution of the United States would be given full effect in the protection of Petitioner's rights. The Administrative Bureaucracy cannot treat Petitioner as a foreign alien.

See 37 Am Jur Sec. 166 on Fraud and Deceit. Where a confidential or fiduciary relationship exists the situation requires a complete disclosure.

See also 37 Am Jur 2d on Fraud and Deceit, Section 150. There it is quoted:

> "A party to whom inquiry is made concerning the facts involved in a transaction must not according to well-settled principles, conceal or fail to disclose any pertinent or material information in replying thereto, or he will be chargeable with fraud. If any disclosure at all is made, a full disclosure is contemplated, especially where it is contemplated that a party is to rely upon the instructions."

The decision completely bypasses the Administrative Procedures Act, 5 USC and 26 U.S. Code Section 7601. See Donaldson v. U.S. 400 U.S. 523 where it is stated as follows:

> "Section 7601 of the 1954 Code 26 U.S.C. Section 7601 directs the Secretary or his delegate 'to the extent he deems it practicable' to cause Treasury Department officers or employees ' to proceed . . . and inquire after and concerning' all persons 'who may be liable to pay any internal revenue tax.' The section thus flatly imposes upon the Secretary the duty to canvass and to inquire. This is an old statute. It has roots in the first of the modern general income tax acts, namely, the Tariff Act of October 3, 1913, Section II."

The right to Petition, Protest and Join Issue with the Internal Revenue Service is a First and Fifth Amendment right. See Miller vs. U.S. 230 F. 486 at 489 where the Court stated; "The claim and exercise of a Constitutional right cannot be thus converted into a crime."

The Court, however, comes to the conclusion that Petitioner waived his constitutional rights against self incrimination when Petitioner did not start suit to protect his constitutional rights against self incrimination. The law is well settled on waiver. See the following cases:

U.S.Fla. 1972. In civil, no less than criminal area, courts indulge every reasonable presumption against waiver of procedural due process rights. U.S.C.A. Const. Amend. 14.--Fuentes v. Shevin, 92 S.Ct. 1983.

Waiver of constitutional rights in any context must, at the very least, be clear and any contractual language relied upon must, on its face, amount to a waiver.

U.S.Ill. 1970. Courts may indulge every reasonable presumption against loss of constitutional rights.--Illinois v. Allen, 90 S.Ct. 1057, 397 U.S. 337, 25 L.Ed.2d 353, rehearing denied 90 S.Ct. 1684, 398 U.S. 915, 26 L.Ed.2d 80.

U.S.N.M. 1970. Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of relevant circumstances and likely consequences.--Brady v. U.S., 90 S.Ct. 1463, 397 U.S. 742, 25 L.Ed.2d 747.

C.A.Ala. 1970. Court must indulge every reasonable presumption against waiver of constitutional right, and acquiescence in the loss of such a fundamental right is not to be presumed.--Hamilton v. Watkins, 436 F.2d 1323.

C.A.Fla. 1970. Waiver of constitutional right is not to be lightly inferred and must be shown to have been knowingly, voluntarily and intentionally made.--Baker v. Wainwright, 422 F.2d 145, certiorari denied 90 S.Ct. 2243, 399 U.S. 927, 26 L.Ed. 794.

The Court also erred in refusing to instruct the Jury along the lines set out in U.S. vs. Sullivan and U.S. vs. Murdock. These cases set forth procedure to be followed by the citizen in protecting his Fifth Amendment rights when confronted with the duty to complete and file a 1040 IRS Return.

That the Fifth Amendment privilege against self incrimination is applicable to cases arising out of 26 U.S. Code is too well settled to dispute. See Miranda vs. Arizona, 384 U.S. 436; Arnstein v. McCarthy 254 U.S. 71, U.S. vs. Sullivan, 274 U.S. 259. See also 2 Am Jur 2d on Administrative Law Sections 266 through 272.

See also Federal Power Commission vs. Metropolitan Edison Co. 304 U.S. 375 where the "willful" qualification is construed, the Court said; "the qualification that the refusal must be 'willful' fully protects one whose refusal is made in good faith and upon grounds which entitle him to the Judgment of the Court before obedience is compelled."

See also Reisman v. Caplin, 374 U.S. 440 which involved a suit to restrain the issuance of a summons upon the ground that non-compliance called for criminal penalties; There the Court said:

> Petitioners also point to Section 7604 (b) as posing the risk of arrest should the Commissioner proceed under that section for an "attachment . . . as for a contempt."
>
> Arguably, such a sanction, even though temporary, might be a penalty severe enough to bring the section within the rationale of Young, supra, but we do not so read Section 7604 (b). This section provides that where "any person summoned . . . neglects or refuses to obey such summons" the Commissioner may proceed before the United States Commissioner or the judge of the District Court "for an attachment against him as for a contempt." Upon a person so refusing is issued and he is brought before the United States Commissioner or the district judge who proceeds "to a hearing of the case." Upon the hearing the United States Commissioner or the district judge may "make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts . . . . " The predecessor of Section 7604 (b) was adopted by the Congress in 1864 (13 Stat. 226) at a time

when Congress was greatly concerned with tax collection delay. Cong. Globe, 38th Cong., 1st Session 2440-2441 (1864). The proponents of the bill emphasized that after arrest the witness could assert his objections to the summons. Cong. Globe, 38th Cong., 1st Sess. 2997 (1864). It appears to us that the provision was intended only to cover persons who were summoned and wholly made default or contumaciously refused to comply. Section 7402 (b) came into the statute in 1913 (38 Stat. 179) and has been uniformly used since that time.

Finding that the remedy specified by Congress works no injustice and suffers no constitutional invalidity, we remit the parties to the comprehensive procedure of the Code, which provides full opportunity for judicial review before any coercive sanctions may be imposed. Cf. United States v. Babcock, 250 U.S. 328, 331 (1919).

See also Slagle v. Ohio, 366 U.S. 259 which involved Fifth Amendment objections before the Ohio Un-American Activities Commission. There the Court stated:

Surely traditional notions of fair play contemplate that a person summoned to testify before any adjudicatory or investigatory body, including a legislative investigatory committee, may object to any question put to him upon any available ground, however tenuous.

And the Ohio Commission, several times and in many ways, clearly gave appellants to understand that such was their right at this hearing. Exercising that right, if not actually accepting the Commission's invitation, appellants, except for a few preliminary questions, objected to most of the questions put to them, principally on the ground of the Fifth Amendment. With important exceptions to be noted, instead of overruling the objection or in any way directing the witness to answer the question, the Commission gave every indication that it

sustained, or at least acquiesced in, the objection by immediately passing on to the next question. That process was scores of times repeated.

That "a clear disposition of the witness' objection is a prerequisite to prosecution for contempt is supported by long-standing tradition here and in other English-speaking nations. In this country the tradition has been uniformly recognized in the procedure of both state and federal courts." Quinn v. United States, 349 U.S. 155, 167-168 and cases cited. See also Emspak v. United States, 349 U.S. 190, 202; Bart v. United States, 349 U. S. 219, 223. "Because of the (Commission's) consistent failure to advise (appellants) of (its) position as to (their) objections, (appellants were) left to speculate about the risk of possible prosecution for contempt; (they were) not given a clear choice between standing on (their) objection(s) and compliance with a committee ruling." Bart v. United States, supra, at 223.

In these circumstances, to hold that these witnesses willfully and contumaciously refused to answer the questions to which they objected but which they were not directed to answer would deprive them of due process in violation of the Fourteenth Amendment.

In the letter of December 19, 1969, the Internal Revenue Service acquiesced in Petitioner's Fifth Amendment claims. No administrative relief was sought by the IRS. By not giving appellant an administrative and judicial determination as they were commanded to do by Federal Statute the IRS waived the Government's rights and acquiesced in Appellant's position, namely, that to complete the 1040 Return as required by Statute and Regulation would in fact incriminate Appellant.

Petitioner further asserts that as applied to the facts in this case 26 USC 7203 is unconstitutional. The statute to be constitutional must save the right s of the parties especially where there are vested interests regarding the privilege against self incrimination involved. The law must save the rights of the parties or it is unconstitutional. If the law does not provide the procedural steps for Notice and hearing it is then deemed to authorize proceedings without Notice and Hearing and is unconstitutional. See Gove vs. Murray County, 147 Minn. 24. 179 NW 569.

> See 16 Am Jur 2d Sec. 177 on Constitutional law; "Since an unconstitutional law is void the general principles follow that it imposes no duties, confers no rights, creates no office, bestows no power or authority on any one, affords no protection, and justifies no acts performed under it." See cases cited.
>
> A court cannot amend an unconstitutional statute or give it effect by an Order to Show Cause. See article 3 of the Minnesota Constitution. No Court can exercise a legislative power under the Constitution of Minnesota.
>
> See 16 Am Jur 2d Const. Law Sec. 560 on the subject of Notice on due process of law. " . . . the statute itself must, to be constitutional specifically require Notice, since in the absence of such a requirement, it will be deemed to authorize proceedings without notice."

See also Boyd vs. U.S. 116 U.S. 616 and Gardner v. Broderick 88 S.Ct. 1913 where it is quoted as follows:

> Our decisions establish beyond dispute the breadth of the privilege to refuse to respond to questions when the result may be self-incriminatory, and the need fully to implement its guaranty. See Spevack v. Klein, 385 U.S. 511 (1967); Counselman v. Hitchcock, 142 U.S. 547, 585-586 (1892); Albertson v. SACB, 382 U.S. 70, 80 (1965). The privilege

is applicable to state as well as federal proceedings. Malloy v. Hogan, 378 U.S. 1 (1964); Murphy v. Waterfront Commission, 378 U.S. 52 (1964). The privilege may be waived in appropriate circumstances if the waiver is knowingly and voluntarily made.

Answers may be compelled regardless of the privilege if there is immunity from federal and state use of the compelled testimony or its fruits in connection with a criminal prosecution against the person testifying. Counselman v. Hitchcock, supra, at 585-586; Murphy v. Waterfront Commission, supra, at 79.

CONCLUSION

The Internal Revenue Service cannot make a waiver out of the failure of the taxpayer to specifically claim the Fifth Amendment objection as to each individual question and the failure to start a lawsuit and submit the matter to the Court. Every presumption is against the waiver of fundamental constitutional rights. Petitioner raised his Fifth Amendment rights against self incrimination in the return and presented it to the Internal Revenue Service so that it could take such steps as it saw fit to have the claim reviewed. No more could be required of any taxpayer. The ordinary citizen does not have the know-how to bring Three-Judge suits.

In conclusion, Petitioner is requesting that the Judgment of Conviction of December 18, 1972 and the Judgment of the Circuit Court of Appeals of July 20, 1972 be set aside with directions to enter a Judgment of acquittal or in the alternative a new trial because of erroneous instructions by the trial Judge.

Wherefore, your Petitioner prays that a Writ of Certiorari be issued by this Court directed to the Respondent and to the Clerks of the U.S. Circuit Court of Appeals for the 8th Circuit and the Clerk of the U.S. District Court for the District of Minnesota to certify to the Supreme Court of the United States the complete record in Circuit Court No. 73-1059 and in District Court Record No. 3-72-CR-153 to the end that the Judgments of December 18, 1972 and July 20, 1973 be reviewed and reversed by the Supreme Court and for

such other relief as may be authorized by law.

Respectfully submitted,

Jerome Daly, Pro Se
Box 1676
St. Paul, Minnesota 55111

STATE OF MINNESOTA
SS
COUNTY OF HENNEPIN

Jerome Daly, having been first duly sworn deposes and states that he is Petitioner herein. That he has read and subscribed to the foregoing and that the contents are true to the best of his knowledge, information and belief.

Jerome Daly

Subscribed and sworn to before me this August 28, 1973

CHESTER P. STACKHIS,
Notary Public, Hennepin County, Minn.
My Commission Expires Sept. 8, 1976.

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 73-1059

United States of America,	Appellee	Appeal from the United States District Court for the District of Minnesota
v.		
Jerome Daly,	Appellant	

Submitted: June 14, 1973

Filed: July 20, 1973

Before Vogel, Senior Circuit Judge, Van Oosterhout, Senior Circuit Judge, and Ross, Circuit Judge.

Per Curiam.

This is an appeal from a jury verdict finding the defendant Daly guilty of wilfully failing to file an income tax return for the years 1967 and 1968, in violation of 26 U.S.C.A., Section 7203.

It is stipulated that defendant, formerly an attorney, received over $6,000.00 in legal fees in 1967 and more than $10,000.00 in 1968.

Defendant filed what he contends are tax returns for each of the years involved. On the return blanks he supplied his name, address, occupation and signature and a notification "See exhibit A attached hereto." Exhibit A objects to the income tax law as being unconstitutional and states that the taxpayer cannot fill out any of the information sought by the return without waiving his constitutional right against self-incrimination. The purported returns were returned to him because they were found not to be returns required by the law and the regulations in that they were not filled out to include any information as to income or expenses. Purported amended returns were filed substantially the same as the originals which again failed to set out any information with respect to income or expenses, and again asserted defendant's constitutional right to protection against self-incrimination. Defendant for a reversal relies upon the following points:

1. Defendant's filing of returns containing no information relating to income or expenses was nonetheless sufficient to comply with the Section 7203 requirement that he "make a return."

2. The Fifth Amendment excuses defendant from answering all questions on the return relating to income and expenses.

3. A subpoena directed against the IRS was erroneously quashed.

4. The district court erroneously refused to instruct the jury on the definition of a dollar.

5. Defendant's criminal prosecution was illegal because it should have been preceded by some form of administrative action.

We find all of defendant's contentions lack merit for the reasons hereinafter stated, and affirm the conviction.

Defendant's first contention is answered by United States v. Porth, 426 F.2d 519 (10th Cir. 1970), where the court held:

> "A taxpayer's return which does not contain any information relating to the taxpayer's income from which the tax can be computed is not a return within the meaning of the Internal Revenue Code or the regulations adopted by the Commissioner. 10 Mertens, the Law of Federal Income Taxation, Section 55.22 (1964 Revision); Florsheim Bros. Dry Goods Co. v. United States, 280 U.S. 453, 462, 50 S.Ct. 215, 74 L.Ed. 542 (1930); Sanders v. Commissioner of Internal Revenue, 225 F.2d 629 (10th Cir. 1955), cert. denied, 350 U.S. 967, 76 S.Ct. 435, 100 L. Ed. 839 (1956); National Contracting Co. v. Commissioner of Int. Rev., 105 F.2d 488 (8th Cir. 1939)." 426 F.2d at 523. See also Virginia L. Reiman, T.C.Memo 1968-117.

Defendant's second contention involves the scope of his Fifth Amendment protection against self-incrimination. Defendant sees himself in a cruel trilemma: If he filed and answered questions truthfully he would be incriminating himself; if he filed and answered questions untruthfully he would be subjecting himself to a perjury charge; if he failed to file returns he would be committing a crime. Cf. United States v. Egan, 459 F.2d 997 (2d Cir. 1972). The chief error in defendant's position is his blanket refusal to answer any questions on the returns relating to his income or expenses for the years in question. "(E)ven (if a particular) question was incriminating, since the Government has a substantial interest in its tax revenues, appellant's privilege would relate only to his refusal to respond to the question, not to a total failure to file the return." United States v. Egan, supra at 998. As previously suggested, defendant's conduct in this case amounts to "a total failure to file." If the return called "for answers that the defendant was privileged from making, he (may raise) the objection in the return, but could not on that account refuse to make any return at all." United States v. Sullivan, 274 U.S. 259, 263 (1927). In an analogous situation involving this same defendant's "blanket Fifth Amendment objection to an inquiry and interrogation by the Internal Revenue Service" this court held "that the taxpayer 'cannot assert the privilege to

every question asked by the examiner, most of which are innocuous on their face.'" Heligman v. United States, 407 F.2d 448, 450 (8th Cir. 1969), citing Daly v. United States, 393 F.2d 873 (8th Cir. 1968).

In Heligman v. United States, supra, this court stated:

> "(T) he taxpayer is not the final arbiter of the privilege. The privilege must be specifically claimed on a particular question and the subject matter submitted to the court for its determination as to the validity of the claim.
>
> "The defendant here, however, claims a blanket privilege against the mere making or filing of the return.
>
> * * * *
>
> "The public need for requiring voluntary disclosure of income transcends any personal right to thwart national objectives by allowing an undisclosed self-determination of possible incrimination, thus excusing complainacne with the income tax laws. We, therefore, hold that the Fifth Amendment privilege against incrimination does not extend to defendant's failure to file. . . . " 407 F.2d 450-51, 452 (emphasis added). See also California v. Byers, 402 U.S. 424 (1971); United States v. MacLeod, 436 F.2d 947 (8th Cir. 1971).

Defendant has made no reasonable showing with respect to how the disclosure of the amount of legal fees he received during the years in question, as shown by the stipulation made at the trial, could possibly incriminate him.

Defendant's third contention is wholly without merit. The subpoena in question was clearly overbroad, unreasonable, oppressive, and lacking in particularity and relevance.

Defendant's fourth contention involves his seemingly incessant attack against the federal reserve and monetary system of the United States. His apparent thesis is that the only "Legal Tender Dollars"

are those which contain a mixture of gold and silver and that only those dollars may be constitutionally taxed. This contention is clearly frivolous. See Koll v. Wayzata State Bank, 397 F. 2d 124 (8th Cir. 1968).

Defendant's fifth contention is that his criminal prosecution is illegal because it was not preceded by some form of administrative action. Defendant cites no apposite authority for this proposition. We are unable to discover any authority to support this proposition.

The judgment appealed from is affirmed.

A true copy.

Attest: Clerk, U. S. Court of Appeals,
Eighth Circuit.

SUPREME COURT, U. S.
No. 73-392
OCT 31 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

JEROME DALY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
SCOTT P. CRAMPTON,
Assistant Attorney General,
RICHARD B. BUHRMAN,
CHARLES E. BROOKHART,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-392

JEROME DALY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 20-24) is not yet reported. The district court did not file an opinion.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1973, and a petition for rehearing was denied on August 9, 1973. The petition for a writ of certiorari was filed on August 31, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's filing of an Individual Income Tax Return Form 1040 containing only his name,

address, occupation, signature, and date, together with the claim that further disclosures would violate his Fifth Amendment privilege against self-incrimination, bars his prosecution for wilful failure to file a tax return.

STATEMENT

Following a jury trial in the United States District Court for the District of Minnesota, petitioner was convicted on two counts of wilfully failing to file tax returns, in violation of Section 7203 of the Internal Revenue Code of 1954. He was committed to the custody of the Attorney General under the provisions of 18 U.S.C. 4208(b) for a study of his mental condition, as provided in Section 4208(c). Execution of the sentence was stayed pending appeal. The court of appeals affirmed (Pet. App. 20-24).

The evidence established that during the years 1967 and 1968 petitioner was a practicing lawyer in Savage, Minnesota (Tr. 54).[1] By stipulation, it was agreed that he received legal fees of $6,346.75 and $10,482.78 for the years 1967 and 1968, respectively (Tr. 61-63, 189). In addition, there was evidence that he received an additional $12,000 in fees in 1968 (Tr. 133-137, 190).

Petitioner timely filed Forms 1040 (United States Individual Income Tax Return) for 1967 and 1968, each of which contained only his name, address, signature, date, occupation, and an attached "exhibit" upon which he objected to the tax laws as being unconstitutional and asserted his claim that he could

---

[1] "Tr." references are to the transcript of trial. "Gov. Ex." references are to government exhibits admitted in evidence.

not supply any of the requested information without waiving his constitutional right against self-incrimination (Tr. 180-183; Gov. Exs. 9-13, 17-20, 24-28). On December 19, 1969, the Internal Revenue Service returned these documents to petitioner with a letter stating that they were not returns because they did not include information relative to income and expenditures (Tr. .75; Gov. Ex. 15). Petitioner thereafter filed "amended returns" which again failed to disclose any information relative to income, expenditures, credits or tax. (Tr. 76-77, 155, 182; Gov. Exs. 17-20, 24-28.) Typed on all the "returns" was the statement, "I further object to the form of the return upon the grounds it may tend to supply information which may tend to lead to information which might tend to * * * incriminate me" (Tr. 182; Gov. Exs. 9-13, 17-20, 24-28).

Although petitioner did not testify, he did explain his defense to the jury in his closing argument, saying: "[A]ll I have said is, if you want information from me, I want immunity from a state or federal prosecution because I think that the filling out of these forms might tend to incriminate me under a state or federal law * * *." (Tr. 255.)

The court of appeals affirmed the conviction, holding the the filing of the purported returns did not constitute the filing of returns within the meaning of the Internal Revenue Code and that petitioner's blanket refusal to answer any questions on the returns did not present a valid Fifth Amendment claim (Pet. App. 20-24).

ARGUMENT

Citing this Court's decision in *United States* v. *Sullivan,* 274 U.S. 259, petitioner argues (Pet. 10-11)

that the filing of "tax returns" containing only his name, address, signature, date and occupation, together with a statement that the submission of any further information would violate his Fifth Amendment rights, is sufficient to invoke the privilege. Apart from this general statement, however, petitioner has at no time indicated which questions on the Form 1040 are objectionable, nor has he made any showing of how the answers to these questions might incriminate him. "In order to invoke the privilege, it is necessary to show that the compelled disclosures will themselves confront the claimant with 'substantial hazards of self-incrimination.'" *California* v. *Byers,* 402 U.S. 424, 429.

In *Sullivan,* the Court held that the Fifth Amendment does not protect the recipient of illegal income from prosecution for wilful refusal to file an income tax return. If any disclosures required by the return are privileged, the Court stated, the privilege should be claimed on the return (274 U.S. at 264). By claiming compliance with *Sullivan,* petitioner in effect acknowleges that he is required to file a tax return but contends that the return does not have to contain any information which could possibly incriminate him. But as the court subsequently explained in *Albertson* v. *Subversive Activities Control Board,* 382 U.S. 70, 79, in language particularly appropriate here, the *Sullivan* decision rested on the view that "the questions in the income tax form were neutral on their face and directed [to] the public at large" and that "a self-incrimination claim against every question on the tax return, or based on the mere submission of the return, would be virtually frivolous * * *."

Plainly, the filing of what is essential a blank return without any information as to income and expenses

does not comply with the return filing requirement. *United States* v. *Porth,* 426 F. 2d 519, 523 (C.A. 10), certiorari denied, 400 U.S. 824. Thus, petitioner's assertion represents nothing more than a claim of a blanket privilege against the filing of an income tax return, a contention which has been uniformly rejected since *Sullivan.* See, *e.g., California* v. *Byers, supra,* 402 U.S. at 434; *United States* v. *Egan,* 459 F. 2d 997 (C.A. 2), certiorari denied, 409 U.S. 875; *United States* v. *MacLeod,* 436 F. 2d 947, 951 (C.A. 8), certiorari denied, 402 U.S. 907; *United States* v. *Porth, supra;* and *Heligman* v. *United States,* 407 F. 2d 448 (C.A. 8), certiorari denied, 395 U.S. 977.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General,
SCOTT P. CRAMPTON,
Assistant Attorney General.
RICHARD B. BUHRMAN,
CHARLES E. BROOKHART,
Attorneys.

OCTOBER 1973.

DOJ-1973-10